Supreme Court, U.S.
FILED

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NO. _____

IN THE

Supreme Court Of The United States

VALHALLA CEMETERY COMPANY
Petitioner,

v.

H.E. MONROE, JR.,
In his official capacity as the
Commissioner of the Department of Revenue
of the State of Alabama
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF PETITIONER

WILLIAM J. BAXLEY, ESQUIRE
CHARLES A. DAUPHIN, ESQUIRE
BAXLEY, DILLARD, DAUPHIN & McKNIGHT
2008 Third Avenue South
Birmingham, Alabama 35233
(205) 939-0995

Ray D. Gibbons, Esquire
GORDON, SILBERMAN, WIGGINS & CHILDS
420 North 20th Street, Suite 1400
Birmingham, Alabama 35203
(205) 328-0640

Attorneys for Petitioner
Valhalla Cemetery Company

31 pp

QUESTION PRESENTED FOR REVIEW

I.

Whether a state statute, enacted to close a "loophole" in the state use tax discovered ten years earlier and given retroactive effect for three years, thereby preventing recovery of taxes illegally collected, violates the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution?

We contend it does as the State neither acted "promptly" nor established a "modest" period of retroactivity. *United States v. Carlton*, 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994).

CERTIFICATE OF INTERESTED PERSONS

Counsel for Respondent Commissioner of Revenue	Ron Bowden Margaret Johnson McNeill
Counsel for Petitioner	William J. Baxley Charles A. Dauphin Ray Gibbons
Trial Judge	Hon. Sally Greenhaw Circuit Judge Montgomery County, Alabama 15th Judicial Circuit
Respondent	H.E. Monroe, Jr., In his official capacity as The Commissioner of the Department of Revenue of the State of Alabama
Petitioner	Valhalla Cemetery Company
Supreme Court of Alabama	Hon. Perry O. Hooper, Sr. Hon. Hugh Maddox Hon. J. Gorman Houston Hon. Ralph D. Cook Hon. Harold See Hon. Champ Lyons, Jr. Hon. Jean Brown Hon. Douglas Inge Johnstone Hon. John H. England, Jr.
Court of Civil Appeals	Hon. William E. Robertson Hon. Sharon G. Yates Hon. Roger M. Monroe Hon. John B. Crawley Hon. William C. Thompson

No other persons are known to have participated directly or indirectly in the appeal of this matter.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE GROUNDS OF JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 6

CONCLUSION 10

APPENDIX FILED WITH PETITION A-1

TABLE OF AUTHORITIES

Cases: *Page*

United States v. Carlton,
512 U.S. 26, 114 S.Ct. 2018,
129 L.Ed.2d 22 (1994) 6, 9

United States v. Darusmont,
449 U.S. 292, 101 S.Ct. 549,
66 L.Ed.2d 513 (1981) 7, 8

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1, 96 S.Ct. 2882,
49 L.Ed.2d 752 (1976) 8

Other Authorities

Act No. 97-301, Ala. Acts 1997 5

STATEMENT OF GROUNDS OF JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 1257 because this petition is from a decision of the Supreme Court of Alabama in a civil case and the validity of a state statute is drawn into question on the grounds that it is repugnant to the Constitution of the United States.

(i) Date of the decision November 5, 1999.

(ii) No rehearing or extension of time has been sought or obtained.

(iii) No cross petition has been filed

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1), 28 U.S.C. § 1257 and Rule 10(c) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

(I) Nature of the Case, Course of Proceedings, and Disposition

Petitioner filed suit in the Circuit court of Montgomery County, Alabama, challenging the constitutionality of the retroactive provisions of Act 97-301, which changed Alabama's use tax to include purchases previously exempt and applied retroactively to prevent any reimbursement for the illegal taxes previously collected by the State. The trial court entered an order declaring the retroactive provisions of Act 97-301 unconstitutional. The Commissioner of Revenue appealed the trial court's decision to the Supreme Court of Alabama which transferred the appeal to the Alabama Court of Civil Appeals. The Alabama Court of Civil Appeals issued an opinion on May 14, 1999, reversing the trial court's decision and declaring Act 97-301 constitutional. Petitioner then filed a Petition for Writ of Certiorari to the Alabama Supreme Court which was denied on November 5, 1999. The

Petitioner now seeks this Honorable Court's grant of the Writ.

(II) Statements of Facts with Reference to the Record

In November, 1985 the State of Alabama, Department of Revenue, Administrative Law Division issued its final order in the matter, *State of Alabama v. Rawhide Erection Company, Inc.* The Chief Administrative Law Judge held as follows:

> The assessments in issue are for state and local use tax. The use tax is applicable only to sales made outside of the State where the property is subsequently brought into Alabama for storage, use, or consumption. *Paramount-Richards Theaters v. State,* 55 So.2d 812; *State v. Dees,* 333 So.2d 818. The above cases hold directly for the proposition that sales consummated within the state cannot be subjected to use tax. In the present case there is no question that the sales in issue were completed in Alabama. In each case the structural steel was delivered by the vendor to the Taxpayer at the Alabama job sites. Under *Code of Alabama,* 1975, Section 7-2-106, a sale occurs with the transfer of title. *Code of Alabama,* 1975, Section 7-2-401 provides that title transfers with the physical delivery of the goods. Accordingly, the sales in question occurred within Alabama, when the steel was delivered by the vendors to the Taxpayer at the job sites. The Revenue Department does not dispute that fact. That being the case, the transaction in issue cannot be subject to either state or local use tax.

(CR. 61, 62; Exhibit 10, page 2.)

The Alabama Revenue Department understood the significance of the *Rawhide Erection* decision to be that the purchase of out-of-state goods which were delivered

to Alabama by the vendor or common carrier was not subject to the Alabama use tax. (CR. 62; Cowen depo., pp. 26-28.) Therefore, the Department of Revenue appealed the decision in *Rawhide Erection* to the Circuit Court of Montgomery County, Alabama, which upheld the administrative law decision, specifically stating:

> Alabama has in effect separate sets of statutes governing the retail sale of personal property: The sales tax statutes govern retail sales within the state while the use tax statutes govern sales made outside the state when the purchased goods are thereafter brought into the state for storage, use, or consummation. *Paramount-Richards Theaters v. State,* 256 Ala. 515, 55 So.2d 812 (1951). In interpreting these laws, the coverage and scope of taxing statutes are strictly construed against the taxing authority and in favor of the taxpayer. *Lepeska Leasing Corp. v. State,* 395 So.2d 82, *cert. denied,* 395 So.2d 85 (Ala. 1981).
>
> To determine which tax is applicable requires determining whether or not the sale in question took place within the state. *State v. Dees,* 333 So.2d 818, *cert. denied,* 333 So.2d 821 (Ala. 1976). According to Section 7-2-106, *Code of Alabama* (1975), a sale of goods occurs when title passes from the seller to the buyer for a price. Section 7-2-401 defines the passing of title:
>
> > Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of goods.
>
> There being no evidence of a contrary agreement, title to the steel passed to Rawhide when the steel was delivered to the construction sites.

> Thus, clearly the sales were affected in this state. As a result, Rawhide is not subject to levy of use tax.

(CR. 62; Exhibit 14, page 3.) The Department of Revenue did not appeal the Circuit Court decision in *Rawhide Erection.* (CR. 62; Cowen depo., p. 30.) Yet, after the decision the Department of Revenue refused to follow the judicial precedent and continued to charge use taxes to Alabama consumers who purchased goods from out-of-state sellers and received delivery of those goods by common carrier in Alabama. (CR. 63; Cowen depo., pp. 37-42.)

Several years later in November, 1993 the Alabama Department of Revenue, Administrative Law Division, entered a final order in *State of Alabama Department of Revenue v. Rush Hospital/Butler, Inc.* which followed the holding in *Rawhide Erection* that Alabama could not legally collect the use tax on goods sold out of state but delivered in state. (CR. 63; Exhibit 11.) The Department of Revenue chose to accept the decision and not appeal to the circuit court. Still, the Alabama Revenue Department continued to collect the illegal tax. The Department of Revenue never informed any person or company which paid a consumer use tax on the purchase of out-of-state goods delivered by the vendor about the Montgomery County Circuit Court ruling in 1986 or its own 1993 administrative rulings, but simply ignored those decisions and continued to illegally collect the use tax. (CR. 63; Cowen depo., pp. 92, 93.)

Over three years later in February 1997, after still another administrative law decision against the Alabama Revenue Department, the legislative fiscal offices forwarded to the Department of Revenue "FYI" an early draft of a bill to amend Alabama's use tax statute. The memo referenced the "Rush Hospital" problem, the 1993 administrative law decision. (CR. 63; Exhibit 19.)

On May 7, 1997, the governor of Alabama signed into law Act 97-301. (CR. 63; Exhibit 16.) Act 97-301 amended the use tax statute by applying the use tax to every situation where a sales tax was not paid. (CR. 63; Cowen depo., p. 63.) Generally, the amended act exempts from the use tax only transactions where a person or consumer actually pays a sales tax to a seller licensed to collect Alabama sales taxes. (CR. 63; Cowen depo., p. 67.) Section 3 of Act 97-301 made the amendment retroactive for all "open tax years." (CR. 63; Exhibit 16.)

The term "open tax years" means all tax years in which the Department of Revenue may assess taxes. When a use tax return is filed, the Department may assess taxes within three (3) years from the date the taxes were due. In the absence of a return being filed, there is no limitation on when the department can assess taxes. "Open tax years" are the tax years open for assessment on which the taxpayer may file a petition for refund. Normally, the taxpayer has three (3) years from the date a tax is paid to ask for a refund. If, however, the tax paid is less than twenty-five percent (25%) of the tax due, the tax year stays open for a period of six (6) years. (CR. 63; Cowen depo., pp. 68-72.)

Petitioner Valhalla paid use taxes to the State of Alabama for the three years preceding the passage of Act 97-301 on all goods purchased from out-of-state vendors which were delivered to Valhalla in Alabama by the vendor or common carrier. (Affidavit of Jesse Edwards.) Because the 1997 Act making the use tax correction was made retroactive for all "open tax years," Valhalla was denied a tax refund.

ARGUMENT

Amplification of Reasons for Allowance of Writ.

The opinion of the Alabama Court of Civil Appeals, which upheld the retroactive effect of Act 97-301, undeniably violates the principles of law pertaining to due process enunciated by this Court in *United States v. Carlton*, 512 U.S. 26 (1994). *United States v. Carlton* unambiguously holds that legislation imposing a tax retroactively must meet the test of due process: a legitimate legislative purpose furthered by rational means. Although an extension of a state use tax to cure a tax loophole can be a legitimate legislative purpose, the retroactive application of the tax to thwart all refund claims after the state has intentionally collected a tax known to be illegal for over eleven years, is not a rational means.

United States v. Carlton, supra, involves an estate tax deduction under Section 2057 of the Internal Revenue Code, which provision, enacted by Congress in October of 1986, provided that an estate could deduct one-half of the proceeds from the sale of "employer securities: to an employee stock ownership plan. *Id.* Carlton, as executor of the decedent's estate, purchased a large amount of MCI stock with funds from the estate. Two days later, in December of 1986, he sold all of such stock to the MCI employee stock ownership plan. He then took a deduction for one-half of the proceeds of such sale. In the following year, December of 1987, Congress amended the statute to provide that to qualify for such deduction, the decedent had to have owned the employer securities immediately before death. The amendment further provided for retroactive application. Thereafter, the Internal Revenue Service disallowed Carlton's deduction. Carlton paid the asserted tax deficiency and instituted a refund action, arguing that the retroactive application of the amended statute violated the Due Process Clause of the Fifth Amendment of the U.S. Constitution. *Id.* at 28-29.

In deciding whether the retroactive tax complied with the constitutional requirements of due process, this Court determined two factors. First, Congress' purpose in enacting the amendment was neither illegitimate nor arbitrary. *Id.* at 32. Secondly, Congress acted promptly to cure a tax and established only a modest period of retroactivity. *Id.* at 32-33. This Court specifically noted that the retroactive period was "only slightly greater than one year," and that Congress had proposed the amendment only a few months after the original enactment of Section 2057. *Id.* at 33. In reaching its holding in *Carlton,* the Court explained that retroactive application of a tax statute should be "confined to short and limited periods required by the practicalities of producing national legislation." *Id.* at 32-33, citing *United States v. Darusmont,* 449 U.S. at 296-97, a condition met by the statute under attack in *Carlton.*

The requirement of a "modest" period of retroactivity was illuminated by Justice O'Connor in her concurrence wherein she examined the precedents set by this Court's earlier decisions and quoted from *United States v. Darusmont,* 449 U.S. 292 (1981) for the proposition that:

> [U]sually the 'retroactive' feature has application only to that portion of the current calendar year preceding the date of enactment, but some statutes have been applicable to an entire year that had expired preceding enactment. This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation.

Id. at 37. (O'Connor, J., concurring), *citing, Darusmont,* 449 U.S. at 296-297. Justice O'Connor then stated that "the Court has never intimated that Congress possesses unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations." *Id., quoting,*

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 229, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (O'Connor, J., concurring), *quoting, Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16, 96 S.Ct. 2882, 49 L.Ed.2d 752 91976). She further stated that "the governmental interest in revising the tax laws must at some point give way to the taxpayer's interest in finality and repose." *Id.* at 37-38. As grounds for these propositions, she stated:

> Because the tax consequences of commercial transactions are a relevant, and sometimes dispositive, consideration in a taxpayer's decisions regarding the use of his capital, it is arbitrary to tax transactions that were not subject to taxation at the time the taxpayer entered into them.

Id. at 38.

Finally, Justice O'Connor noted that:

> In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment. *See, United States v. Hemme, supra*, 476 U.S. at 562, 106 S.Ct. at 2074-2075 (1 month); *United States v. Darusmont*, supra, 449 U.S. at 294-295, 101 S.Ct. at 550-551 (10 months); *United States v. Hudson*, 299 U.S. 498, 501, 57 S.Ct. 309, 310, 81 L.Ed. 370 (1937) (1 month). . . . A period of retroactivity longer than the year preceding the legislature session in which the law was enacted would raise, in my view, serious constitutional questions.

Id. at 38.

Although the above due process requirements were acknowledged by the Alabama Court of Civil Appeals, its opinion erred in the application of the facts of this case to the second prong of the test as annunciated by this Court, i.e., the legislature must have "acted promptly and

established only a modest period of retroactivity." *United States v. Carlton, supra.*

While the Alabama Court of Civil Appeals' opinion acknowledged Act 97-301 is retroactive for two (2) to three (3) years,[1] it failed to determine whether the three-year period of retroactivity was a "modest" period, *Carlton, supra,* or "confined to short and limited periods required by the practicalities of producing ... legislation," *Darusmont, supra.* Clearly, the only purpose in making the tax retroactive for "all open tax years" was to eliminate all possibility of refunds. The statute of limitation for refunds being three (3) years, Act 97-301 eliminated all refund claims. As seen below, the state legislature simply legitimized the theft by fraud committed by the state.

The opinion of the Alabama Court of Civil Appeals, which refused to consider the "promptness" with which the Alabama Legislature acted, did note that in 1986 the Montgomery County Circuit Court held that the sales tax, rather than the use tax, applied to situations where the physical delivery of goods into Alabama constituted a sale closed in Alabama. Because the out-of-state vendor did not have sufficient contacts with the State of Alabama, the sales tax was not applicable. The opinion also noted that in 1993 and 1997 administrative law judges followed the decision of the Montgomery County Circuit

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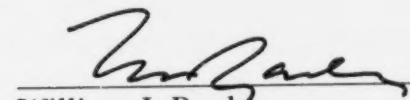
[1]Act 97-301 applies to all "open tax years" which means all tax years in which the Department of Revenue may assess taxes. When a use tax return is filed, the Department may assess taxes within three (3) years from the date the taxes were due. In the absence of a return being filed, there is no limitation on when the department can assess taxes. Thus, Act 97-301 has a *minimum* application of three years. And, if the tax paid is less than twenty-five percent (25%) of the tax due, the tax year stays open for a period of six (6) years. (CR. 63; Cowen depo., pp. 68-72.)

Court and held the use tax did not apply. Thus, from 1986 through the passage of Act 97-301 in April of 1997, more than ten years, the State of Alabama continued to collect an illegal tax. The Department of Revenue ignored the circuit court's ruling, ignored the administrative law judges' rulings, and never disclosed the illegality of the tax to affected persons and companies. It is unconscionable to hold that the passage of Act 97-301, eleven years after the initial judicial decision declaring the use tax inapplicable to these sales, met the due process requirements of "promptness" and "modesty." The retroactive period was not enacted promptly after discovery of the tax's limited applicability and is not "modest." It is absolute. It eliminates all refunds.

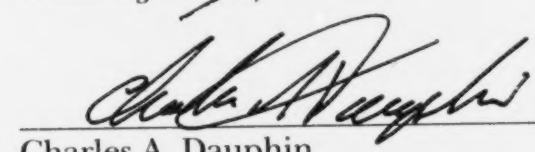
CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Writ of Certiorari, and after consideration of the merits of this petition, reverse the decision of the Alabama Court of Civil Appeals.

Respectfully submitted,



William J. Baxley



Charles A. Dauphin

Attorneys for Petitioner
BAXLEY, DILLARD, DAUPHIN & McKNIGHT
2008 Third Avenue South
Birmingham, Alabama 35233
(205) 939-0995

APPENDIX

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

VALHALLA CEMETERY COMPANY, et al.,	)	
Plaintiffs,	)	
vs.	)	CV-97-940-GR
G. SAGE LYONS, et al.,	)	
Defendants,	)	

ORDER

This matter is before the Court on motions for summary judgment filed by both parties. Present in court at the date and time scheduled for hearing were the attorneys for the parties.

The material facts are undisputed. Plaintiff is seeking a declaratory judgment regarding imposition of use tax on goods sold in Alabama by out of state merchants as well as injunctive relief requesting a refund of previously collected taxes. It is undisputed that Valhalla Cemetery Company, Inc. remitted use taxes from April of 1994 through March of 1997 to the Alabama Department of Revenue on purchases from out-of-state vendors who did not have a nexus to the State of Alabama. Plaintiff is an Alabama corporation with its principal place of business in Jefferson County, Alabama.

On May 7, 1997, Act No. 97-301, which amended the use tax exemption, was signed into law. Section 2 of the Act states that the intent was "to clarify that current law exempts from use tax only that property sold at retail in Alabama on which sales tax was paid." Section 3 of the Act made it retroactive for all open tax years.

Prior to the amendment of the act, the Circuit Court of Montgomery County in *State of Alabama v. Rawhide Erection Company* (CV-86-175-PH) had determined that when there is a physical delivery of goods by a vendor to an Alabama site, such constitutes a sale and transfer of title at the time of delivery. The Court held that such transactions were not subject to a use tax. No appeal was taken from this ruling. However, the Department continued to charge use taxes on goods purchased out-of-state and delivered to an Alabama site.

In November of 1993, in *State of Alabama Department of Revenue v. Rush Hospital/Butler, Inc.*, the Administrative Law Judge entered an order which again held that sales taxes, not use taxes are applicable when there is a delivery made in Alabama. That order was not appealed.

In January of 1997, in *Bluegrass Bit Company, Inc. et al. v. State of Alabama Department of Revenue,* an Administrative Law Judge again ruled that use taxes could not be charged on property delivered into Alabama and voided those tax assessments. Subsequently, on June 9, 1997, after Act 97-301 was passed, the Administrative Law Judge reversed the January order and affirmed the assessments and ordered that the use taxes, with interest, be paid.

The parties agree that the Legislature can impose use and sales taxes. Furthermore, Plaintiff does not contend or argue that the statute is ambiguous. The principal rule of statutory construction is that words used in a statute must be given their plain and ordinary meaning and a court is bound to interpret the language to mean what it says. *IMED Corp. v. Systems Engineering Associates Corp.*, 602 So.2d 344 (Ala. 1992). It is obvious from reading Act 97-301 that it was the clear intent of the Legislature to amend the use and sales tax structure so that the only exemption from imposing the use tax is when sales taxes are paid.

There is no prohibition against the enactment of a retroactive law, however, Plaintiff does contend that the retroactive provision is unconstitutional. Again, the amendment is not ambiguous and it is equally clear that the Legislature intended to make the amendment retroactive for all open tax years. Therefore, the issue is whether the retroactive aspect of the act is unconstitutional. Pursuant to Ala. Code § 40-2A-7(2), the retroactive assessment period would be anywhere from three (3) years to six (6) years depending on the particular situation.

With regard to taxing statutes, in a recent Alabama case it was reiterated that statutory tax exemptions are not a right but a matter of legislation grace. See *Smith v. Sears, Roebuck & Co.*, 672 So.2d 794 (Ala.Civ.App. 1995). However, taxing statutes should be construed most favorably for the taxpayer and against the taxing authority. *City of Arab v. Cherokee Elec. Co-Op,* 673 So.2d 751 (Ala. 1995). In *Smith,* supra, the retroactive provision of a statute was upheld as being constitutional. However, the Court did not address whether it was constitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

The Supreme Court of the United States has also upheld retroactive tax legislation but it has also held that under the Due Process Clause it must be considered whether such application would be harsh and oppressive. *United States v. Carlton,* 129 L Ed 2d 22 (1994). In construing the retroactive legislation in *Carlton,* one of the factors to be taken into consideration is whether there was a prompt effort to amend the previous legislation. In *Carlton,* the original legislation was adopted on October 22, 1986, and the amendment was enacted on December 22, 1987, and it was upheld as there was "only a modest period of retroactivity" involved. The Court also cited *Welch v. Henry,* 83 L Ed 87 (1938), wherein a Wisconsin

tax was upheld that was adopted in 1935 concerning transactions in 1933. In Welch it was emphasized that the state legislation made the revision at the first opportunity.

Justice O'Conner, in a concurring opinion in *Carlton,* stated that in her view a retroactive period longer than one year would raise serious constitutional questions. And Justice Scalia, with whom Justice Thomas joined, in a concurring opinion, stated that by eliminating a tax benefit after action is taken and refusing to reimburse is more harsh and oppressive than merely imposing a new tax.

Although this Court could not locate any Alabama tax cases interpreting retroactivity under the Due Process Clause, in *River v. State,* 490 S.E.2d 261 (1997), the Supreme Court of South Carolina determined that a statute with a retroactivity period of at least two years and possibly as long as three years was unconstitutional.

The Court has carefully reviewed the matter and the retroactive period of Act 97-301 far exceeds one year. Furthermore, the ruling in *Rawhide* had been in effect for more than ten (10) years when the act was passed. This Court is of the opinion that the retroactive period here is excessive and violates the Due Process Clause under the federal constitution under the facts and circumstances presented here.

Finally, although not argued it should be noted that Act 97-301 does not contain a severability clause. However, if a portion of an act is found to be unconstitutional a court may strike the offending provision and leave the rest of the act intact, with or without a severability clause. *Ex Parte Springer,* 619 So.2d 1267 (Ala. 1992); *City of Birmingham v. Smith,* 507 So.2d 1312 (Ala. 1987).

Wherefore, it is hereby ORDERED as follows:

1. That there exists a justiciable controversy between the parties appropriate for declaratory relief and it is

hereby declared that Sec. 3 of Act 97-301 is hereby declared to be unconstitutional and void.

2. That the Department of Revenue is hereby enjoined from collecting use taxes on good sold in Alabama by out-of-state vendors for open tax years prior to the enactment of Act 97-301 and shall refund any previously collected taxes from Valhalla Cemetery Co., Inc.

3. That the Court reserves ruling on other pending matters, and in particularly those related to the class action aspect of this action, and a status conference shall be held on July 10, 1998 at 8:00 a.m.

Done this 3rd day of June, 1998.

/s/ Sally Greenhaw

SALLY GREENHAW, CIRCUIT JUDGE

cc: Counsel of Record

ALABAMA
COURT OF CIVIL APPEALS

OCTOBER TERM, 1998-99

2980012

H.E. Monroe, Jr., in his official capacity as commissioner of the Department of Revenue, State of Alabama

v.

Valhalla Cemetery Company, Inc., et al.

Appeal from the Montgomery Circuit Court

(CV-97-940)

THOMPSON, Judge

Valhalla Cemetery Company, Inc., filed an action against H.E. Monroe, Jr., in his official capacity as the commissioner of the Department of Revenue (hereinafter the "Department"), seeking to have the collection of a use tax on purchases from out-of-state merchants of goods delivered into Alabama declared void and illegal. Valhalla also sought class certification of its action. The trial court certified the class pursuant to Rule 23, Ala. R. Civ. P. Valhalla later amended its complaint, seeking to have § 3 of Act No. 97-301, Ala. Acts 1997, declared unconstitutional. Both sides moved for a summary judgment.

The trial court entered an order in which it declared § 3 of Act No. 97-301 unconstitutional. The trial court enjoined the Department from collecting use taxes on goods purchased from out-of-state vendors and delivered

into Alabama for the open tax years before the enactment of Act No. 97-301. In its order, the trial court also ordered the Department to refund to Valhalla any collected use tax on such sales for those years. The Department filed a postjudgment motion pursuant to Rule 59, Ala. R. Civ. P., or, in the alternative, a motion to have the trial court's ruling certified as final pursuant to Rule 54(b), Ala. R. Civ. P. The trial court later entered an order certifying its judgment as final pursuant to Rule 54(b). The Department appealed to the Supreme Court of Alabama, which transferred the appeal to this court, pursuant to § 12-2-7, Ala. Code 1975.

When an appellant court interprets a statute or considers the constitutionality of a statutory provision, no presumption of correctness attaches to the trial court's interpretation of the statute. *Pilgrim v. Gregory*, 594 So. 2d 114 (Ala. Civ. App. 1991). Where the facts of the case are undisputed and the trial court is called upon to determine a question of law, no presumption of correctness attaches to the trial court's ruling and this court's review is *de novo*. *Tierce v. Gilliam*, 652 So. 2d 254 (Ala. 1994).

A sales tax is assessed on all retail sales made in Alabama. § 40-23-2, Ala. Code 1975. A use tax is assessed on goods that are used or consumed in Alabama. § 40-23-61, Ala. Code 1975. "The use tax serves to equalize the burden of the sales tax and to prevent a person from avoiding the sales tax by purchasing goods outside the state." *Ex parte Fleming Foods of Alabama, Inc.*, 648 So. 2d 577, 578 (Ala. 1994). Section 40-23-62, Ala. Code 1975, sets forth certain exemptions from the use tax. "[E]xemptions from taxation are to be strictly construed against the person or party claiming the exemption and in favor of the right to tax." *Ex parte Fleming Foods of Alabama, Inc.*, 648 So. 2d at 578. *See also Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle*, 460 So. 2d 1219 (Ala. 1984); *State v. Chesebrough-Ponds, Inc.*, 441 So. 2d 598 (Ala. 1983).

In 1986, a Montgomery County trial court affirmed the decision of an administrative law judge that a physical delivery of goods into Alabama constituted a sale closed in Alabama and, therefore, that the sales tax, rather than the use tax, would apply to such a sale. In that case, the out-of-state vendor did not have sufficient contacts with the state of Alabama to make it subject to Alabama's sales tax. The trial court affirmed the administrative law judge's determination that the transaction was subject to neither the use tax nor the sales tax. The Department did not appeal that ruling; however, it continued to charge use taxes on goods purchased from out-of-state vendors and delivered to consumers in Alabama. In 1993, an administrative law judge made a similar ruling; that order was not appealed. Then, in January, 1997, an administrative law judge again ruled that use taxes could not be charged on goods purchased from out-of-state vendors and delivered into Alabama. That ruling was a preliminary order and could not be appealed.

The January 1997 ruling received national media attention, alerting taxpayers of a possible loophole in Alabama's sales and use taxes. In response to that media attention, the legislature enacted Act No. 97-301, which was signed by the Governor in May 1997. We note that in June 1997, the administrative law judge reversed his January 1997 ruling and ordered that the use taxes on products delivered into Alabama from out-of-state vendors be paid.

Valhalla paid use taxes from April 1994 through March 1997 on goods purchased from out-of-state vendors that did not have a nexus with the state of Alabama. Valhalla's purchases from those vendors were delivered to Valhalla in Jefferson County.

On May 7, 1997, the Governor signed Act No. 97-301, an amendment to the use-tax exemption statute at § 40-23-62, Ala. Code 1975. Section 3 of that Act provides that

the provisions of the Act are retroactive for all open tax years. The legislature's intent in enacting Act No. 97-301 was "to clarify that current law exempts from use tax only that property sold at retail in Alabama on which sales tax was paid." Act No. 97-301, § 2.

In the trial court, Valhalla argued that it purchased products from out-of-state vendors and that those products were delivered into Alabama. Thus, it argued, the sales would be subject to the sales tax because a sale is deemed closed on delivery of the product. *See Oxmoor Press, Inc. v. State,* 500 So. 2d 1098 (Ala. Civ. App. 1986). Valhalla argued that the use tax did not apply when the sale was closed in Alabama. This interpretation of § 40-23-62, Ala. Code 1975, before its amendment, would allow a taxpayer to avoid both the use tax and the sales tax where goods were delivered into this state by an out-of-state vendor that was without sufficient contacts with Alabama to make it subject to the sales tax. The enactment of Act No. 97-301 closed off that interpretation of § 40-23-62 by providing that a transaction is exempt from Alabama's use tax only if sales tax on the transaction has been paid to a licensed vendor. Section 3 of Act No. 97-301 provides that the statute is retroactive for all open tax years, i.e., two to three years. See § 40-2A-7 (c) (2), Ala. Code 1975. Thus, the retroactivity provision of Act No. 97-301 would prevent taxpayers from seeking a possible refund of use taxes paid on goods purchased from out-of-state vendors and delivered into Alabama.

In its judgment, the trial court determined that the retroactive period of Act No. 97-301 was excessive and, therefore, a denial of due process. The trial court also ordered that the Department refund the use taxes paid by Valhalla during the disputed period.

On appeal, the Department first argues that the trial court lacked subject-matter jurisdiction over the action because, it claimed, Valhalla had failed to exhaust its

administrative remedies. "The doctrine of exhaustion of administrative remedies provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Bateman v. Blue Cross-Blue Shield of Alabama,* 579 F. Supp. 265, 266 (M.D. Ala. 1984). Section 40-2A-7, Ala. Code 1975, requires that a taxpayer give notice of its claim to the Department of Revenue before the taxpayer can file an action in the circuit court.

There are exceptions to the requirement that a taxpayer exhaust his administrative remedies. Where "[q]uestions of law and of statutory and constitutional construction preponderate over questions of fact," a taxpayer is not required to exhaust its administrative remedies. *Mingledorff v. Vaughan Regional Medical Center, Inc.,* 682 So. 2d 415, 416 (Ala. 1996). Because Valhalla challenged the legal validity and the constitutionality of the use tax and Act No. 97-301, it was not required to exhaust its administrative remedies before resorting to the courts. The trial court had subject-matter jurisdiction in this action.

The Department next argues that the trial court erred in determining that the retroactive period provided for in Act No. 97-301 was unconstitutional as a denial of due process. Retroactive tax legislation is not *per se* unconstitutional and has been upheld by the courts. *United States v. Carlton,* 512 U.S. 26 (1994); *United States v. Darusmont,* 449 U.S. 292 (1981); *Leahart v. Deedmeyer,* 158 Ala. 295, 48 So. 371 (1909); *Maples v. McDonald, 668 So. 2d 790 (Ala. Civ. App. 1995).*

> "This Court repeatedly has upheld retroactive tax legislation against a due process challenge. Some of its decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether 'retroactive application is so harsh and oppressive as to

> transgress the constitutional limitation.' The 'harsh and oppressive' formulation, however, 'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy.' The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive economic legislation:
>
> > " *'Provided that the retroactive application of a statute is supported by legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .'*
> >
> > " . . . 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former' . . . *But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.*"

United States v. Carlton, 512 U.S. 26, 30-31 91994) (citations omitted) (emphasis added).

In *United States v. Carlton*, supra, Congress amended a provision of the federal estate-tax statute to close a loophole. The legislation applied retroactively to the enactment of the original statute approximately one year earlier. The Supreme Court noted that the amendment at issue was clearly "a curative measure" and held that the retroactivity provision in the legislation did not violate the due-process requirement. *United States v. Carlton*, 512 U.S. at 31. In so holding, the Court set forth the test to determine whether retroactive tax legislation denies due process: first, the legislation must be "supported by a legislative purpose furthered by rational means," and

second, the period of retroactivity must be "modest." *United States v. Carlton*, supra.

Using the analysis of the Supreme Court, we conclude that the amendment to § 40-23-62 by Act No. 97-301 also meets the requirements of due process. It is clear that the legislative purpose of Act No. 97-301 was "neither illegitimate nor arbitrary" or based on an improper motive. *See United States v. Carlton*, 512 U.S. at 32. Although Valhalla argues that Act No. 97-301 constitutes an entirely new tax, we cannot agree. "Courts must consider subsequent acts passed by the legislature to clarify previously ambiguous provisions." *Ex parte Disco Aluminum Products Co.*, 455 So. 2d 849, 853 (Ala. 1984). Before its amendment, § 40-23-62(1) provided in relevant part:

> "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> > "(1) Property, the gross proceeds of sales of which are required to be included in the measure of the tax imposed by provisions of Article 1 of this chapter."

Act No. 97-301 amended § 40-23-62(1) to provide in relevant part:

> "The storage, use or other consumption in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:
>
> > "(1) Property, on which the sales tax imposed by the provisions of Article 1 of this chapter is paid by the consumer to a person licensed under the provisions of Article 1 of this chapter."

Thus, it is clear that Act No. 97-301 clarifies the meaning of § 40-62, Ala. Code 1975. Further support for this

conclusion lies in the legislature's stated purpose in enacting Act No. 97-301: "To amend Section 40-23-62, [Ala. Code 1975], relating to exemptions from use tax, to provide that a transaction is exempt from use tax if sales tax has been paid on the transaction by the purchaser; and to provide for a retroactive effective date."

Act No. 97-301 is retroactive for two to three years. This court has upheld the assessment of a tax that was retroactive for eight years. *Smith v. Sears, Roebuck & Co.*, 672 So. 2d 794 (Ala. Civ. App. 1995); *Maples v. McDonald*, 668 So. 2d 790 (Ala. Civ. App. 1995). This court noted in *Smith v. Sears, Roebuck & Co.*, supra, that the United States Supreme Court had held that a retroactive tax statute does not violate a taxpayer's right to due process.

In reaching its judgment, the trial court relied on *Rivers v. State*, 327 S.C. 271, 490 S.E.2d 261 (1997), in which a retroactive provision of tax-refund legislation acted to deprive the taxpayers of half of their expected capital-gains-tax refund, which had been awarded to them by a prior act of the legislature. The Supreme Court of South Carolina determined, given the facts of that case, that a two- to three-year period of retroactivity was excessive and violated the taxpayers' due-process rights. In so holding, however, the South Carolina court stated, "We do not suggest that every retroactivity period of this length is per se unreasonable. In some instances, a lengthy period of retroactivity may be necessary to accomplish certain legitimate legislative ends." *Rivers v. State*, 327 S.C. at 279, n.4, 490 S.E.2d at 625, n. 4.

In this case, the "legitimate legislative end" behind Act No. 97-301 was to close a perceived loophole in Alabama's sales- and use-tax statutes. Valhalla paid the use taxes for the years in dispute, without protest. The day after the enactment of Act No. 97-301, Valhalla filed a complaint seeking a refund of the use taxes it had paid for the open tax years. Act No. 97-301, § 3, acts to prevent

any potential refund of those use taxes. We hold that the retroactive provision of Act No. 97-301 is justified by a rational legislative purpose and that the period of retroactivity is modest. *See United States v. Carlton*, supra. We cannot say, and Valhalla does not argue, that its payment of the use tax was so "harsh and oppressive as to transgress the constitutional limitation [imposed by the requirement of due process]." *United States v. Carlton*, 512 U.S. at 30.

Section 3 of Act No. 97-301 meets the requirements of due process. The trial court erred in determining that § 3 was unconstitutional. We reverse.

REVERSED AND REMANDED.

Robertson, P.J., and Yates and Crawley, JJ., concur.

Monroe, J., concurs in the result.

John H. Wilkerson, Jr., Clerk of the Court Of Civil Appeals of Alabama, do hereby certify the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court.

Witness my hand this 14th day of May, 1999.

/s/ John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

IN THE SUPREME COURT OF ALABAMA
November 5, 1999

1981636

Ex parte Valhalla Cemetery, et al. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Valhalla Cemetery, et al v. H. E. Monroe, Jr.) (2980012) (Montgomery Cir.Ct.No.: CV-97-940)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. NO OPINION.

HOUSTON, J. - Hooper, C.J., and Maddox, Cook, See, Lyons, Brown, and Johnstone, JJ., concur; England, J., dissents.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 5th day of Nov., 1999.

/s/ Robert G. Esdale, Sr.

Clerk, Supreme Court of Alabama